

Before The
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF AMERICAN POSTAL WORKERS
UNION, AFL-CIO

Docket No. C2013-10

**UNITED STATES POSTAL SERVICE RESPONSE IN FURTHER SUPPORT OF ITS
MOTION TO DISMISS**
(December 20, 2013)

The American Postal Workers Union, AFL-CIO (APWU) filed a complaint on September 5, 2013 (Original Complaint). The United States Postal Service (Postal Service) filed a motion to dismiss the Original Complaint due to a number of legal and factual deficiencies on September 25, 2013 (Motion to Dismiss). In response, the Postal Regulatory Commission (Commission) dismissed all but one of the APWU's allegations. Rather than dismiss the only remaining allegation from the Original Complaint because of the "less than adequate record" presented by the APWU, the Commission deferred its ruling and provided the APWU with the opportunity to supplement its Original Complaint to satisfy specific demands for additional information. The APWU responded by filing an entirely new complaint (Amended Complaint) that is, once again, legally and factually deficient. As such, the remaining allegation should be dismissed.

Procedural Background

On November 27, 2013, the Commission issued Order No. 1892, which granted, in part, the Postal Service's Motion to Dismiss the APWU's Original Complaint.¹ Order No. 1892 also held the APWU's Original Complaint in abeyance pending further action by the APWU.² Specifically, in Order No. 1892, the Commission deferred ruling on the Postal Service's Motion to Dismiss with respect to the APWU's claim regarding 39 U.S.C. § 3691(d).³ Instead, the Commission permitted the APWU to file additional information related to its claim or risk *sua sponte* dismissal of its Original Complaint.⁴

On December 13, 2013, the APWU filed its Amended Complaint with the Commission realleging violations of 39 U.S.C. § 3691(d). Pursuant to Order No. 1892, the Postal Service hereby submits this response in further support of the Postal Service's Motion to Dismiss. As set forth more fully below, the Commission should dismiss the APWU's only remaining allegation.

Argument

I. The APWU's Amended Complaint Fails to Satisfy the Commission's Instructions in Order No. 1892.

In Order No. 1892, the Commission directed the APWU to "identify the specific standards it believes are being violated, the harm alleged to be caused to it by those violations, and allege facts it intends to elicit that, if proven, would constitute violations

¹ Order No. 1892, Order Granting, In Part, Motion to Dismiss and Holding Complaint in Abeyance Pending Further Action, PRC Docket No. C2013-10 (Nov. 27, 2013).

² *Id.*

³ *Id.* at 16.

⁴ *Id.* at 16 and n.21.

of those regulations.”⁵ Despite this unequivocal mandate, the APWU filed a fatally flawed Amended Complaint that ignores the Commission’s directive to identify the harm caused by any alleged service standard violations or the facts that, if proven, would establish such service standard violations. Because of the absence of these required components in the APWU’s response to Order No. 1892, the Commission must dismiss the Amended Complaint as it indicated it would do in footnote 21 of that Order.⁶ The Postal Service will discuss each of the APWU’s failures in turn.

A. The APWU Failed to Identify Any Potential Harm Resulting from Alleged Violations of the First-Class Mail Service Standards.

The Commission indicated in Order No. 1892 that the APWU’s Original Complaint was deficient for numerous reasons, including the lack of harm alleged, and permitted the APWU to file specific supplementary information in an effort to rectify that deficiency. The APWU, however, relied upon the same flawed analysis—listing cities to and from which it mails letters and how those letters arrived after the expected delivery day—and the APWU did not identify even one instance of how it was harmed by any alleged service standard violations. This simple factual recitation remains deficient and needs substantially more to rise to the level of identifying specific harms suffered by the APWU as the Commission required.

The APWU identifies local APWU chapters in Waco, Texas; Brooklyn, New York; New Brunswick, New Jersey; Colorado Springs, Colorado; and Jacksonville, Florida, which allegedly use First-Class Mail to send items to members and the APWU national

⁵ *Id.* at 16.

⁶ *Id.* at 16 n.21 (“If the APWU elects not to file the additional information on or before December 13, 2013, the Commission will, *sua sponte*, issue an order dismissing this element of the Complaint.”).

office.⁷ These alleged mailings contain items identified as “materials”, newsletters, letters and union election ballots. Assuming that these items mailed by the APWU local chapters failed to satisfy the requisite service standards, facts which the Postal Service does not concede, the APWU has alleged no harm as a result of any potential violation. Instead, the APWU relies only on the fact that the mailings allegedly violated the service standards without identifying any consequences of such violations. This failure to even attempt to identify a potential harm fails to satisfy the Commission’s requirements in Order No. 1892.

The APWU’s alleged “test mailings” fare no better in identifying any harm to the APWU. Assuming that 25 percent of the APWU’s test mailings missed their expected delivery date as alleged, the APWU fails to state, or even imply, that any of those 10 alleged violations resulted in any harm to the APWU. As such, the test mailing does nothing to satisfy the Commission’s specific direction to identify APWU’s alleged harm.

Finally, the APWU’s allegations regarding the Westside Pioneer, a weekly newspaper, fail to establish harm as required by Order No. 1892.⁸ Much the same way that the APWU raised the claims of non-parties in its Original Complaint, the APWU discusses this non-party newspaper in an effort to identify some potential harm as a result of the alleged service standard violations. While the Postal Service regrets any

⁷ The Postal Service notes that the APWU and its local chapters are separate entities and any alleged harms to one are not necessarily harms to the other. While the Postal Service does not deem it necessary to belabor this point in this response, as the grounds for dismissal for failure to properly respond to the Commission’s directives in PRC Order No. 1892 are more than sufficient, should the Commission permit this case to proceed past the motion to dismiss stage, the Postal Service intends to limit this case to any potential harms to the named party, the American Postal Workers Union, AFL-CIO, not the unnamed non-party APWU local chapters.

⁸ The APWU has not alleged, and the Postal Service has not found, any indication that the APWU is the publisher or owner of the Westside Pioneer.

possible service delays that may have impacted the Westside Pioneer previously, the APWU's double hearsay allegations about service standard violations for this non-party are not evidence of any harm to the APWU. As the Commission made clear in Order No. 1892, the APWU must identify the harm "caused to it," not a randomly selected third party.⁹

Ultimately, the Commission set what most would expect to be a rather attainable goal for a complainant to meet—identify any harm that may be somewhat related to the violations that the APWU is asserting. Despite this mandate, the APWU fails at every step of the way to identify even the barest allegation of harm. In all likelihood, this is because the APWU has not actually been harmed as a mailer but is instead attempting to disguise a labor dispute as service standards violations in an effort to get the Commission to prevent plant consolidations.¹⁰

B. The APWU Failed to Identify Any Facts that, if Proven, Would Establish Service Standard Violations.

i. The Amended Complaint Fails to Identify Any New Facts as Required by the Commission.

The Commission also identified in Order No. 1892 that the APWU's Original Complaint was deficient because it did not sufficiently "allege facts it intends to elicit that, if proven, would constitute violations" of the service standard regulations.¹¹ The Commission held that, in the Original Complaint, "[t]he APWU makes general claims

⁹ PRC Order No. 1892 at 16.

¹⁰ The Postal Service notes again that of the millions of mailers using the Postal Service, only the union that represents the bulk of employees at the mail processing plants subject to consolidation has brought a case alleging service standard violations. While its status as a harmed mailer is suspect at best, its motives in bringing these claims to the Commission are undeniably clear.

¹¹ PRC Order No. 1892 at 16.

and provides anecdotal reports that the current service standards established by Postal Service regulations are being violated.”¹² Due to these deficient allegations, the Commission was unable to conclude whether the APWU raised any material issues of fact or law.¹³ The claims alleged in the Amended Complaint are equally general and anecdotal, once again failing to raise a material issue of fact or law.

The APWU’s Amended Complaint contains new allegations in an apparent attempt to comply with the Commission’s Order that it “allege facts it intends to elicit that, if proven, would constitute violations” of the relevant service standard regulations.¹⁴ Among the new allegations is the assertion that the “Postal Service has External First Class (‘EXFC’) performance information that shows that the Postal Service has failed to meet its service standard pursuant to 39 C.F.R. § 121.1(a) [and] (b).”¹⁵ This assertion equates to the APWU’s original allegation that “the Postal Service has information that it has not made public that will show the [service standard] violations.”¹⁶ Identifying the specific measurement system by name does not cure the deficiency in the allegation.¹⁷ As the Commission explained in Order No. 1892, “the APWU must do more.”¹⁸ As required by Rule 3030.10(a)(5), the APWU must describe “with greater specificity the evidence it seeks from the Postal Service.”¹⁹

¹² *Id.* at 15.

¹³ *Id.*

¹⁴ *Id.* at 16.

¹⁵ Amended Compl. ¶ 22; *see also* Amended Compl. ¶¶ 92-97.

¹⁶ Original Compl. ¶ 25.

¹⁷ Moreover, the APWU has had access to EXFC data through the publicly filed service performance reports, yet the APWU did not use these data to support its allegations.

¹⁸ PRC Order No. 1892 at 16.

¹⁹ *Id.*

For the same reasons described in the Postal Service's Motion to Dismiss, the facts surrounding the test mailing that the APWU conducted following the issuance of Order No. 1892 by the Commission also fail to satisfy the Commission's directive to identify facts that would establish service standard violations.²⁰ Namely, the test mailing involved allegations of "discrete service performance problems within a narrow timeframe, not a pattern or trend of problems."²¹ The circumstances surrounding the test mailing, however, perfectly illustrate the flaws inherent in basing allegations on such discrete examples. According to the Amended Complaint, the APWU mailed only 40 pieces from a single location without verifiable data regarding when the items were accepted or delivered.²² Furthermore, the test mailing coincided with the start of the holiday mailing season and took place during a period of severe weather that impacted much of the country.²³ Even if the APWU could prove the facts asserted regarding the test mailing, those facts would be insufficient to show that the closings and consolidations caused violations in First-Class Mail service standards.

²⁰ Amended Compl. ¶¶ 78-91.

²¹ United States Postal Service Motion to Dismiss the Complaint of the American Postal Workers Union, AFL-CIO, PRC Docket No. C2013-10 (Sept. 15, 2013), at 18.

²² Amended Comp. ¶ 78.

²³ Winter Storm Cleon took place from December 5, 2013, through December 7, 2013. See, e.g., Winter Storm Cleon: State-by-State Impacts (Dec. 9, 2013), available at: <http://www.weather.com/news/weather-winter/winter-storm-cleon-update-20131202>. Due to Winter Storm Cleon, states of emergency were declared in Arkansas, Tennessee, and Texas. See Meghan Evans, Accuweather.com, REPORTS: State of Emergency, Thousands Without Power in Ice Storm (Dec. 7, 2013), available at: <http://www.accuweather.com/en/weather-news/live-destructive-ice-storm-unf/20679290>. The impact of the storm included power outages, road closures, deferred flights, and other transportation delays. See, e.g., Brantley Hartgrove, The Dallas Observer, Onco: 240,000 power outages in the Dallas-Fort Worth area due to Winter Storm Cleon (Dec. 6, 2013), available at http://blogs.dallasobserver.com/unfairpark/2013/12/onco_240000_power_outages_in.php; Winter Storm Cleon affects travel in Texas, Arkansas, Indiana, and Elsewhere (Dec. 6, 2013), available at <http://www.weather.com/news/weather-winter/winter-storm-cleon-travel-impacts-20131205>.

With respect to the Amended Complaint's claims regarding specific Postal Service facilities and APWU local chapters, the allegations in the Amended Complaint are equally as anecdotal as those in the Original Complaint.²⁴ And, the Commission previously recognized that such allegations are insufficient to raise a material issue of fact or law.²⁵

ii. The Facts as Alleged Do Not Constitute a Service Standard Violation.

In addition to being insufficient under the Commission's standard set forth in Order No. 1892, each of the new allegations from the Amended Complaint falls outside of the scope of the regulations governing service performance reporting. As the Postal Service explained in its Motion to Dismiss, the Commission's regulations governing service performance require a quarterly and annual analysis at the District, Area, and/or National level, not an assessment of individual allegations of service performance problems at specific points in time at the Sectional Center Facility level.²⁶ An evaluation of individual data points is inconsistent with the Commission's service performance reporting regulations and with the Commission's position that annual and quarterly reports "provide the appropriate level of detail necessary to evaluate a product" and that "too great a level of detail could distract" from the Commission's assessment of service performance by "requiring focus on potential anomalies in data that might not be relevant to a product's overall performance."²⁷ Moreover, the service performance

²⁴ Amended Compl. ¶¶ 25-77.

²⁵ PRC Order No. 1892 at 15-16,

²⁶ Mot. to Dismiss at 18.

²⁷ *Id.* at 18-19 (quoting Order No. 465, Order Establishing Final Rules Concerning Periodic Reporting of Service Performance Measurements and Customer Satisfaction, PRC Docket No. RM2009-1 at 16).

reports that the Postal Service files with the Commission contain, or are based on, EXFC data. The underlying data identified by the APWU in its Amended Complaint will not provide support to prove its allegations. The performance of a handful of isolated individual pieces of mail should not constitute a service standard violation.

Similar to its failure to identify a sufficient allegation of harm in its Amended Complaint, the APWU also fails to allege facts it intends to elicit that, if proven, would constitute a violation of the relevant service standards. As such, the Commission should dismiss the APWU's 39 U.S.C. § 3691(d) allegations.

II. The APWU Still Lacks Standing to Maintain Its Claim.

In addition to the APWU's failure to satisfy the Commission's explicit directives to identify the alleged harm, the Commission also should dismiss the Amended Complaint for lack of standing. In Order No. 1892, the Commission held that the APWU was an "interested person" and had standing because the APWU is a "mailer who sends and receives mail to and from postal districts in every state and territory" and because "the APWU has a direct stake in and may be aggrieved if the allegations in the Complaint are true."²⁸ The Commission further stated that despite the APWU's representations in its Response to the Motion to Dismiss that its mail has been delayed:

²⁸ PRC Order No. 1892 at 9.

The Complaint, however, contains more general representations, *i.e.*, that the APWU mails millions of pieces of mail per year. See Complaint ¶ 21. If the APWU elects to file additional information pursuant to this Order as set forth below, it must, in this proceeding, also elaborate on the harm to it allegedly caused by violations of current service standards.²⁹

As explained above, despite these instructions, the APWU failed to make any allegations of harm or injury. Failing to make any such allegations in two completely different versions of its complaint should be sufficient to establish that the APWU has, in fact, not been harmed by any alleged service standard violation, and as such, the APWU is not an interested person and lacks standing to maintain its 39 U.S.C. § 3691(d) claim.

III. The APWU's Allegations Regarding 39 U.S.C. § 3691(d) Are Still Not Yet Ripe.

In its Motion to Dismiss, the Postal Service argued that the APWU's 39 U.S.C. § 3691(d) claims were not ripe because the operational changes at issue were not yet complete. In Order No. 1892, the Commission left open the question of ripeness, permitting the APWU to file additional information in an effort to overcome the problems with its 39 U.S.C. § 3691(d) allegations. The APWU's continued inability to comply with the pleadings requirements and Order No. 1892 further supports the Postal Service's ripeness argument. The Amended Complaint lacks any factual support for the position that the claims are ready for adjudication. This is because the operational changes at issue in the Original Complaint and Amended Complaint are still not yet complete. As such, the allegations in the Amended Complaint are not yet ripe for review.³⁰

²⁹ *Id.* at 9 n.18.

³⁰ See Mot. to Dismiss at 21.

Moreover, as explained above, the APWU does not rely on or identify appropriate service performance measurement data required to support its allegations. The APWU cannot demonstrate a causal relationship between the consolidations and closures and the alleged service standard violations based on the facts it identified in its Amended Complaint.³¹ Because the allegations are not yet ripe for evaluation, the Commission should not allow the APWU's Amended Complaint to proceed.

Finally, the APWU concedes that "the Annual Compliance Determination does allow for the Commission to review the Postal Service's performance and determine whether the Postal Service was in compliance with service standards in effect during the previous year."³² Given the fact that implementation is not yet complete, and the service performance measurement data necessary to evaluate service performance do not yet exist, the Annual Compliance Determination, rather than the complaint process, remains the appropriate venue to evaluate service performance in a matter consistent with current regulations.

³¹ *Id.* at 23-24.

³² Response of American Postal Workers Union, AFL-CIO to USPS Motion to Dismiss, PRC Docket No. C2013-10 (Oct. 2, 2013), at 7.

Conclusion

For the reasons set forth above and in the Postal Service's Motion to Dismiss, the Commission should dismiss the APWU's claim regarding 39 U.S.C. § 3691(d), the only remaining claim, with prejudice.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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